



July 16, 1999

Mr. William S. LeMaistre  
University of North Texas Health Science Center at Fort Worth  
3500 Camp Bowie Boulevard  
Fort Worth, Texas 76107-2699

OR99-2007

Dear Mr. LeMaistre:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125014.

The University of North Texas Health Science Center ("UNTHSC") received a request for a copy of a contract for medical services between UNTHSC and the federal corrections institute in Fort Worth. The requestor also sought a copy of the preliminary proposal made by UNTHSC to the corrections institute. You object to release of the preliminary proposal made by UNTHSC and assert that this information is protected from disclosure under sections 552.103, 552.104, 552.107 and 552.110.

To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to the litigation. *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.), *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental entity must meet both prongs of this test for information to be excepted under section 552.103(a). You state that the proposal was part of the subject of a bid protest filed with the U.S. General Accounting Office by Medical Devices International ("MDI"). Although the contract award was upheld, you indicate that MDI may appeal the decision. Thus, you believe that litigation concerning the proposal is reasonably anticipated. In Open Records Decision No. 452 at 4 (1986), this office stated:

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. [Citations omitted.]

Although you believe that the decision upholding the bid award may be challenged, you have shown no concrete evidence supporting your argument that litigation in this situation is reasonably anticipated. Thus, section 552.103(a) is not applicable to the proposal.

You also assert that section 552.104 of the Government Code protects release of the proposal. Section 552.104 protects from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect the government’s interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See* Open Records Decision No. 463 (1987). In these situations, the exception protects the government’s interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract.

When a governmental body seeks protection as a competitor, however, it may claim the “competitive advantage” aspect of section 552.104 if it (a) demonstrates that it has specific marketplace interests, and (b) demonstrates actual or potential harm to its interests in a particular competitive situation. Open Records Decision No. 593 (1991). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

Section 105.71 of the Education Code provides that UNTHSC is a separate institution from the University of North Texas (the “University”) though it is under the direction of that university’s board of regents. Section 105.77 of the Education Code provides that UNTHSC has the authority to execute and enter agreements with other entities “to provide clinical, postgraduate, including internship and residency, or other levels of medical educational work.” You assert that section 105.77 gives UNTHSC the authority to compete with other entities in bidding situations to comply with its section 105.77 mandate. You have provided this office information showing that UNTHSC is in direct and current competition with MDI, which has already challenged the contract award and could further challenge the contract. Thus, we conclude that release of the proposal at issue would harm UNTHSC’s legitimate marketplace interests as they fall within the scope of section 105.77. The proposal may be withheld from disclosure under section 552.104.<sup>1</sup>

As we resolve this matter under section 552.104, we need not address sections 552.110 & 552.305 issues. We are resolving this matter with an informal letter ruling rather than with

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<sup>1</sup> Regarding your argument that the proposal is protected financial or commercial information under section 552.110, please see *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.—Austin May 20, 1999, no pet. h.).

a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref: ID# 125014

Encl. Submitted documents

cc: Ms. Charlotte Huff  
Fort Worth Star-Telegram  
400 West Seventh Street  
Fort Worth, Texas 76102  
(w/o enclosures)